

The Family Court of the State of Delaware



FELICE GLENNON KERR
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 9400
WILMINGTON, DELAWARE 19801-3732

September 21, 2020

Kara M. Swasey, Esquire
Bayard P.A.
600 N. King Street, Suite 400
Wilmington, DE 19801

LETTER DECISION AND ORDER

W S

Re: W S v. J M
File No.: CN05-05692; Petition No.: 20-08531
Petition Type: Visitation Modification

Dear Parties:

The Court held a Hearing for a Petition for Visitation Modification on September 8, 2020.¹ The petition was filed by W S (“Father”) against J M (“Mother”) in the interest of J S (“ ”) (born,). Both parties were present. Mother was represented by Kara M. Swasey, Esquire. Father was not represented at this hearing. Father requested to see J more frequently. Father requested unsupervised visitation or visitation in his home. Mother requested J maintain supervised visitation until Father has progressed enough with family therapy. Mother, Father, and N C, family therapist, (“Ms. C ”) testified. Based upon the evidence presented, this is the Court’s decision.

PROCEDURAL HISTORY

On May 18, 2011, the parties stipulated to modification of the April 5, 2007, custody Order which gave Father visitation every Thursday and alternating weekends. The parties continued to consent to joint legal custody with Mother having primary residency.

Mother filed the pending Petition to Modify Custody on October 29, 2018. The petition alleged that J had become increasingly alienated from Mother due to Father’s failure to support the relationship between Mother and J. Mother specifically alleged that Father

¹ The Court notes that this hearing took place through Zoom due to COVID-19 restrictions.

actively undermined Mother's authority and encouraged J to refer to Mother in derogatory terms or by her given name (J) instead of "Mom". On November 16, 2018, Father filed an Answer to Mother's Petition and counterclaimed. Father denied Mother's accusations and stated that he was not the source of J 's alienation towards Mother. Father also stated he has supported the relationship between Mother and J , and that he did not display any behavior that actively undermined Mother's authority. On November 26, 2018, Mother filed an Answer to Father's Counterclaim that restated her positions.

On February 12, 2019, Mother filed an Emergency Motion for Temporary Custody and a Motion and Affidavit for an Emergency *Ex Parte* Order. In both motions, Mother was seeking immediate suspension of all contact between Father and J and immediate therapy for Father and J . Mother alleged there was a risk of immediate and irreparable harm in the form of emotional abuse. On February 12, 2019, the Court granted immediate suspension of all contact between Father and J until the emergency hearing and ordered Father to give J 's passport to Father's attorney within twenty-four hours. On February 21, 2019, the Court held a brief emergency hearing and ordered Father to have visitation through the Visitation Center once per week. Father was excluded from having any other contact with J , even phone contact was suspended on an interim basis. The Court also Ordered J to begin family counseling and for Father to begin individual counseling. On March 25, 2019, the Court issued a new interim Order stating that Father's visitation would be at Ms. C 's discretion. The Court held a bi-furcated Custody Hearing on June 13, 2019, and July 9, 2019. The hearing was bi-furcated at the request of the parties at the conclusion of the first day of trial to allow the parties to present all relevant evidence.

On September 27, 2019, the Court issued an Order and granted Mother and Father joint legal custody and that J maintain her primary residency with Mother. Father would have visitation as recommended by the family therapist, Ms. C . On October 7, 2019, Mother filed a Motion for Reargument and on October 15, 2019, Father filed a Response to the Motion. On October 22, 2019, the Court issued an Order on the Motion for Reargument, clarifying the terms of the counseling process and entering a provision regarding the Child's passport. Mother filed a Motion for Attorneys' fees and cost on December 2, 2019, and Father filed a Response to the Motion on December 13, 2019. On January 7, 2020, the Court issued an Order on Attorneys' fees and cost. The Court awarded Mother the sum of \$41,632.00 in Attorneys' fees and cost.

On February 18, 2020, Father filed a Motion for Replacement of Family Counselor due to him feeling there has not been any improvement with his relationship with J . On March 2, 2020, Mother filed her Response and on March 3, 2020 the Court denied Father's Motion. On March 31, 2020, Father filed a petition to modify visitation due to cost of supervised visitation with the family therapist and limited amount of time Father is able to spend with J . On June 10, 2020, the Court held a teleconference. In the Court's June 11, 2020, Order, the parties agreed to Father and J having supervised visits through A S and Father would no longer participate in sessions with Ms. C , however, Mother and J would

continue to meet with Ms. C . Father and J would continue to have FaceTime communication with J on Wednesdays and Sundays and the FaceTime sessions would be sent to Ms. C for monitoring. On July 1, 2020, Mother filed an Answer to Petition for Modification of Visitation Order and a Response to Motion for Replacement of Current Counselor. On July 6, 2020, the Court Ordered that Father's Motion for Replacement of Family Counselor and Mother's response was moot because the Court entered an order on June 11, 2020, addressing Father's participation in family counseling and Mother having the authority to make decisions regarding the child's continued counseling.

LEGAL STANDARD

The Court may modify previous orders concerning visitation, legal custody, and residency at any time when the best interest of the child would be served by such modification.² When the Court hears a full hearing on the merits for modification of visitation for one parent who does not have primary residency or legal custody of the child, the Court must consider a schedule which gives frequent and meaningful contact with the child to that parent.³ This frequent and meaningful contact is conditional based on the impact on the Child's physical health and emotional development.

BEST INTEREST FACTORS

The statutory factors are discussed below. In the interest of judicial economy, the Court will not recite all the testimony from the hearing that can be more fully obtained from the record.

(1) The wishes of the child's parent or parents as to his or her custody and residential arrangements;

Mother requested that she have primary residency and that Father have supervised visitation until J reaches the age of eighteen (18). Mother further requested that Father

² Pursuant to Del. CODE ANN. tit. 13, § 729(a) and (b):

- (a) An order concerning visitation may be modified at any time if the best interest of the child would be served thereby in accordance with the standards set forth in § 728(a) of this title.
- (b) An order entered by the Court by consent of all parties, an interim order or a written agreement between the parties may be modified at any time by the Court in accordance with the standards set forth in § 722 of this title.

³ Pursuant to Del. CODE ANN. tit. 13, § 728(a):

The Court shall determine, whether the parents have joint legal custody of the child or 1 of them has sole legal custody of the child, with which parent the child shall primarily reside and a schedule of visitation with the other parent, consistent with the child's best interests and maturity, which is designed to permit and encourage the child to have frequent and meaningful contact with both parents unless the Court finds, after a hearing, that contact of the child with 1 parent would endanger the child's physical health or significantly impair his or her emotional development. The Court shall specifically state in any order denying or restricting a parent's access to a child the facts and conclusions in support of such a denial or restriction.

continue with supervised phone calls on Wednesdays and Sundays and J can receive phone calls from paternal grandparents and paternal cousins. Mother testified that she wishes to continue using My Family Wizard to coordinate events with Father involving J . Mother testified that she believes J has made improvements through counseling. Mother does not want J to regress in counseling or her overall behavior toward Mother's family.

Father requested to modify the current visitation order. Father does not believe that his contact with J needs to be supervised or at the direction of Ms. C . Father wants to see J more. Father feels that his visitation was taken away because Ms. C is biased by her feelings toward him. Father feels that Ms. C always sides with Mother. Father explained that Ms. C often mentions the inappropriate telephone calls, and Father stated he has apologized about them countless times. Father testified he has written letters to Mother, Mother's family, and J . Father testified that he feels his relationship with J drifting due to his limited visitation and phone schedule.

Factor (1) does not favor either parent as the parties are requesting conflicting visitation schedules.

(2) The wishes of the child as to his or her custodian or custodians and residential arrangements;

The Court did not conduct a child interview in this case due to the findings made at the last custody hearing. Given the resist and refuse dynamics present in the case, an interview is not appropriate and was not requested by either party and therefore, this factor is neutral.

(3) The interaction and interrelationship of the child with his or her parents, grandparents, siblings, persons co-habiting in the relationship of husband and wife with a parent of the child, any other residents of the household or persons who may significantly affect the child's best interest;

Father's Relationship with J

Father testified his relationship with J is fine, however, Father expressed that the current visitation schedule is creating a strain on their relationship. Father stated that he feels that his relationship with J is drifting apart. Father has a difficult time having a conversation with J . Father mentioned he and his family have missed out on J 's middle school graduation, homecoming, several school events, and her last two birthdays, since the visitation order has been put into place. Father also stated that J has a good relationship with his extended family in England. Father testified he is aware Mother and J 's relationship has

improved and believes he should be able to have more visitation due to Mother and J 's improved relationship. Father explained his concerns to the Court that he will not be able to financially continue to afford supervised visits. Father advised the Court he recently filed for bankruptcy and his wife is unemployed. During closing arguments, Father stated the Court's current order is stressful for both him and J .

Mother described Father as dishonest. Mother discussed Father's dishonesty, when Father told J that Mother did not inform him where J 's color guard event was held. On redirect, Mother testified that on September 20, 2019, she sent an email to Father through My Family Wizard of the event website that detailed the location, time, and date.⁴ Mother stated that Father does a lot of "game playing." Mother recounted a conversation with Father about J getting braces. Father told Mother he does not have insurance for J , when he did in fact have insurance after filing for bankruptcy. Mother further stated that J needed physical therapy ("PT") for a sore wrist from color guard. When Mother communicated the problem to Father, Father believed PT was not necessary. Mother describes Father's interactions with J as "emotionally abusive." Mother testified J asked Mother to send Father a video of J playing the piano. When J inquired about the video Father acted like he did not care. Mother understands that J seeks Father's approval and feedback but Father does not provide emotional support. Mother believes that J aligns with Father's beliefs to obtain his approval and attention. Mother recounted a July 4, 2020, conversation J had with Father. On that date, J was on the phone with Father and did not tell Father about watching fireworks at a friend's house due to Father's dislike of fireworks. While Mother understands that J is very connected to Father, Mother believes that J 's attachment is unhealthy and that J will sometimes mimic Father's beliefs.

Ms. C additionally opined about Father's unhealthy relationship with J and has the unique perspective of being their treating therapist. Ms. C recounted on February 2, 2020, Father became angry and was not productive during therapy. J mimicked Father's behavior. Since that date, Ms. C has ended family therapy with Father and J and only monitors phone calls between them, and she still works with J and Mother on their relationship. Ms. C believes that J can sometimes be entrenched in Father's ideals and beliefs. However, Ms. C stated that she believes J has made improvements since the February 2, 2020, incident. Ms. C stated J has made adequate progress through therapy, however she has struggled through the process. In J 's last session on August 6, 2020, J was engaging. Ms. C recommends supervised visits and monitored phone

⁴ See Respondent Exhibit #2

calls remain in place with J and Father due to Father's lack of therapeutic improvements. Ms. C further testified that Father's parenting skills need to improve based on his reactions and relationship with J .

J 's Relationship with Mother, Step-Father, and Step-Brother

Mother testified that she and J are improving their relationship. Mother specifically stated that her relationship with J has taken approximately a year to improve with consistent progress through therapy. Mother stated that she and J now have conversations involving school and school friends. Mother stated that she and J participate in activities together, specifically such as bike riding. Mother testified that J had problem with showing affection towards her, but recently, around Christmas of 2019, J has told Mother she loves her and hugs Mother without resisting. Mother mentioned that J and step-brother, R have improved their relationship and engage in activities together like dog walking. Mother stated that J now says I love you to R . Mother mentioned that J and step-father, D 's relationship recently showed signs of improvement. Mother referenced the family's last therapy session on August 6, 2020, D and J had a significant breakthrough in their relationship during the therapy session. Mother stated until last month J would move away from D if she was alone in the kitchen with him, but Mother feels better about their relationship. Overall, Mother testified that she is happy with J 's improvements. However, Ms. C is concerned that the improved relationships are still fragile and that restoring Father's visitation would still undermine these relationships.

Factor (3) favors Mother's position of supervised visitation and monitored phone calls on every Wednesday and Sunday. While Father does want to see J more frequently, J has recently made significant improvements through family therapy with Mother and this progress must be sustained for a period of time before Father resumes visitation. The Court wants Father and J 's relationship to also improve through therapy and will permit Father to explore a new therapist for himself and J as his relationship with Ms. C is so severely strained. Father has not been to a family therapist with J since February 2, 2020. Ms. C acknowledged that J has an unhealthy attachment with Father and she will sometimes mimic his behavior for attention. The Court understands Father's financial concerns of affording a private family therapist, but unfortunately cases of this type are expensive and Father is primarily responsible for creating the unhealthy relationships between J and her parents. While the Court understands that Father has apologized, an apology is not going to remedy the situation alone. The Court is advising Father to seek a family therapist that would accept Father's insurance to help with cost. The Court expects Father to make improvements through family therapy in order to increase visitation with J and to reduce the restrictions on his contact with J .

(4) The child's adjustment to his or her home, school and community;

Mother stated that J turned fifteen (15) on June 25, 2020, and will be starting the tenth (10th) grade at C C S of the A in Wilmington, DE. J participates in color guard. Mother stated that J has made friends on color guard. Ms. C testified that J is a 4.0 student at C C . Mother testified that J currently takes virtual piano lessons. Mother stated this summer J was involved in activities such as dog walking, embroidery, and Pilates. J recently became a babysitter for a family in her neighborhood and babysits for the family three hours daily. Mother told the Court that she believes J is an overall happier child compared to this time last year.

Father did not testify about this factor.

Factor (4) favors Mother's request for visitation to stay as is given J's academic and social successes. J is excelling in school and is involved in extra-curricular activities and has an after school job in her neighborhood.

(5) The mental and physical health of all individuals involved;

Mother specifically stated that she suffered from an artery problem but has aided the medical diagnosis through a plant based diet.

Father did not testify about any medical issues or diagnoses. Father told the Court he completed anger management on January 20, 2020, however, only after a Request for Production was submitted by Mother, did he send the completed certificate that reflected his completion of the course on July 20, 2020.⁵ Father stated he is engaged in therapy and domestic violence counseling with a private counselor. Father no longer obtains family therapy with J through Ms. C . Father explained to the Court that he does not believe Ms. C provides adequate therapeutic services but he has not researched or sought a new family therapy counselor.

Mother testified that J has high cholesterol that is managed through her diet. J has made friends on color guard. Last year J began to care about her grades. Ms. C testified J has a 4.0 grade point average. Mother believes that J is a happier child. Mother recalled a conversation with maternal grandmother in which maternal grandmother

⁵ See Respondent Exhibit #1

mentioned J seems happier. However, Mother testified she does have to correct J's behavior at times due to J displaying bullying behavior. Mother mentioned that J occasionally is not honest, but J's overall behavior has improved. Mother mentioned J cares about her overall appearance and physical health. Mother specifically stated J started losing weight due to eating better and exercising. Mother expressed that she was surprised when J asked for braces in the fall of 2019 after not wanting them at a younger age. Mother testified that J is responsible with her invisalign treatment and wears the retainer as recommended for 22 hours daily.

Ms. C testified that counseling has helped J, even though she has struggled at times. Counseling will take time as the separation between J and Mother occurred over a long period of time. On August, 6, 2020, J's last session, Ms. C stated that J was engaging and has put a lot of effort into improving her relationship with Mother, Step-Father, and Step-Brother. Ms. C expressed her concern that if the Court interviewed J, J would respond with desperation rather than being honest because she wants to see Father, which would not be in her best interest. Ms. C testified that Father has difficulty accepting her criticism. Ms. C rejected Father's claim that she is biased. Ms. C stated she is providing Father with constructive criticism as a therapist. Ms. C was very concerned with Father's behavior during Father's February 2, 2020, therapy session with J as previously mentioned. Ms. C stated, J was not being productive and displayed an attitude she normally does not display during therapy sessions with Mother. Ms. C recommended to the Court that supervised visits remain in place, along with monitored phone calls on Wednesdays and Sundays. Ms. C testified Father has not made any improvements. Father would get mad when Ms. C would express her feelings to him therapeutically. Ms. C feels Father's parenting skills need to be stronger based on reactions and the relationship with J. Ms. C testified that Father does not usually show interest or provide positive reinforcement when having conversations with J.

Factor (5) favors Mother's request for visitation with Father to be supervised along with supervised phone calls. Mother and Ms. C have great concern that unsupervised contact with Father will continue the problem. Although J has made improvements through therapy, J often mimics Father's behavior for attention. In addition, since the February 2, 2020, therapy session Father has not sought a different family therapist to propose. Prior to that incident, Ms. C testified that Father did not make any improvements through therapy. Ms. C expressed concern that Father is not open to therapeutic counseling due to his negative attitude. The Court has some concern that therapy is moving too slowly and that J will lose her relationship with Father, as Father and Ms. C are unable to work together effectively. However, the Court also does not believe that restoring Father's visitation at this juncture

without therapeutic support would be in J's best interest as she is just now showing real significant improvement in her relationships in Mother's household. Therefore, if Father cannot receive therapeutic sessions with Ms. C regarding his relationship with J, Father will have to locate another qualified family therapist who can provide this service. The Court understands that T S is supervising Father's visits with J but is not providing any relationship therapy. While Mother and Ms. C believe it may be best for visitation to be at Ms. C's discretion, the Court finds that visitation should increase rather than remain stagnant and this can be done through increased supervised visitation, as recommended by another counselor who would work with Father and J. Of course to be effective, the new counselor will need to be able to speak with Ms. C to obtain updates on the situation at home between J and her other family members.

(6) Past and present compliance by both parents with their rights and responsibilities to their child under § 701 of this title.⁶

Mother testified that she is employed as an attorney at and that she teaches law as a secondary position. Mother testified that she is involved as a volunteer for J's color guard team and Mother attends every event. Mother testified that J recently got braces and Mother attends every orthodontist appointment. During direct examination, Mother told the Court that she pays the medical bills for J's braces, PT and pediatrician co-pays, and Father has not contributed. Mother further testified that she consumes a plant based diet and J now enjoys eating meals prepared by Mother.

Father stated he attends J's school events when he is available. Father testified about a specific instance when he missed one of J's color guard events due to Mother not telling him the location of the event. On redirect, Mother testified about a September 9, 2019, email she provided Father that detailed the location, time, and date of J's color guard event.⁷ Father testified that he no longer engages in family therapy with Ms. C. Father stated that his family therapy with Ms. C ended on February 2, 2020. Father told the Court that he was unaware he should of sought a new family therapist for him and J. Father stated that he is willing to consult with a new family therapist in order to increase visitation with J.

Factor (6) favors Mother's request for visitation with Father to be supervised along with supervised phone calls. Father has ended family therapy with Ms. C. Father has not sought services from a different family therapist since February 2, 2020. The Court recommends that

⁶ Pursuant to Del. Code Ann. tit. 13, § 701:

The Father and mother are the joint natural guardians of their minor child and are equally charged with the child's support, care, nurture, welfare and education.

⁷ See Respondent Exhibit #2

Father engage in family therapy to increase supervised visitation with J .

(7) Evidence of domestic violence as provided for in Chapter 7A of this title.⁸

Mother did not testify at this hearing about any specific incidents of abuse or domestic violence against herself with Father. Father testified that he is enrolled in domestic violence therapy with a private counselor and he completed anger management.⁹

Factor seven (7) is not considered in this case.

(8) The criminal history of any party or any other resident of the household including whether the criminal history contains pleas of guilty or no contest or a conviction of a criminal offense.

Neither party has concerning criminal histories. The Court notes that Father was charged with Endangering the Welfare of a Child in February 2019, but the charges were dismissed.

As neither party has any criminal convictions, Factor (8) does not favor either party.

CONCLUSION

After considering all the factors listed above, the Court finds that it is in the best interest of J for Father's visitation to remain as it is but with a different therapist due to the rift between Father and Ms. C . Court finds that it is in the best interest of J to continue to have supervised visitation and monitored phone calls every Wednesday and Sunday with Father. The Court finds that father's limited supervised contact is in J 's best interest as she has recently been making adequate improvements through family therapy. The Court recommends that Father seek a family therapist, to create a healthy relationship with J .

THEREFORE, in consideration of the above factors, the Court finds that it is appropriate to enter the following Order:

IT IS HEREBY ORDERED this _____ day of September, 2020 that:

1. Mother shall continue to have legal custody of J .
2. Mother shall maintain primary residency of J .
3. Father shall have supervised visitation with T S per Ms. C 's recommendations until a new therapist is put in place.

⁸ 13 Del. C. § 703A(a).

⁹ See Respondent Exhibit #1

4. Father shall not have any contact with J outside of N C 's recommendations until a new family therapist is put in place.
5. All communications between Mother and Father shall be in writing or via My Family Wizard.
6. J and Mother shall continue counseling with Ms. C .
7. Father shall continue his individual counseling with his current provider.
8. Father shall research therapists who take his insurance to determine if the relationship counseling with J could be covered by his insurance.¹⁰ Father shall provide Mother with a list of names within 30 days of this Order. Mother shall select one name from the list provided by Father. Father also has the option to continue to work with Ms. C if she would agree he could return.
9. Father shall authorize the counselor who will be working with himself and J to communicate with Ms. C and Mother shall authorize Ms. C to communicate with the counselor for Father and J . Father shall also provide the new counselor with the Custody Order and the evaluation by Dr. B .
10. Father shall be solely responsible for the cost of any counseling with the new counselor for himself and J .

Very truly yours,

FELICE GLENNON KERR, Judge

FGK/jco

Date emailed: _____

Date mailed: _____

¹⁰ The Court makes no finding as to whether or not this counseling would be covered by insurance.